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No. A-821

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ST. JOSEPH'S HILL INFIRMARY, INC.,
Appellant,

vs.

RABBI HERBERT J. MANDL, *et al.* as members of the
MISSOURI HEALTH FACILITIES REVIEW COMMITTEE,
Non-interested Party,

and

PACIFIC CARE CENTER, INC.,
Appellee.

On Appeal From The Missouri Court Of Appeals
Eastern District

MOTION TO DISMISS APPELLANT'S APPEAL

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QUESTION PRESENTED

The National Health Planning and Resources Act ("NHPRDA") provides guidelines, subject to waiver by the Secretary, for state certificate of need programs including a provision to allow "persons adversely affected by a final decision of a state agency" the right to judicial review of that decision. Congress and the Department of Health and Human Services have failed to define "persons adversely affected" and expressly left it to each state to judge the needs and goals of its program and how it will be administered.

The question presented here is whether the Missouri Certificate of Need Law ("CON Law") approved by the Secretary of the Department of Health and Human Services, is invalid under the supremacy clause of the United States Constitution because it denies an existing health care provider standing to seek judicial review of a state agency's decision granting a certificate of need for the establishment of a competing health care facility.

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MISSOURI HEALTH FACILITIES REVIEW COMMITTEE,
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and

PACIFIC CARE CENTER, INC.,
Appellee.

On Appeal From The Missouri Court Of Appeals
Eastern District

MOTION TO DISMISS APPELLANT'S APPEAL

Pacific Care respectfully moves this Court to dismiss Appellants Appeal of the decision of the Missouri Court of Appeals, Eastern District, entered on January 29, 1985.

OPINIONS BELOW

Appellant has correctly stated the opinions and the decisions of the state agencies and courts of Missouri in the case before this Court. Appellee shall not therefore repeat these matters.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(a) The Supremacy Clause of the United States Constitution, Article VI, Clause Two, which provides:

> This constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

(b) Jurisdiction for Review of the Missouri Court of Appeals decision in this matter is allegedly conferred by 28 U.S.C. §1257(2), which reads as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * *
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the deicison is in favor of its validity.

(c) The National Health Planning and Resource Development Act, 42 U.S.C. §300n-1(a) and (b)(12)(E), which provide:

> (a) In conducting review pursuant to subsections (e), (f), and (g) of section 1513 [42 U.S.C.U. §3001-2(e), (f), and (g)] or in conducting any other reviews of proposed or existing health services, each health systems agency shall (except to the extent approved by the Secretary) follow procedures, and apply criteria, developed and published by the agency in accordance with regulations of the Secretary; in performing its review functions under section 1523 [42

U.S.C.S. §300m-2], a State Agency shall (except to the extent approved by the Secretary) follow procedures, and apply criteria, developed and published by the State Agency in accordance with regulations of the Secretary; and in performing its review functions a Statewide Health Coordinating Council shall (except to the extent approved by the Secretary) follow procedures and apply criteria developed and published by the Council in accordance with regulations of the Secretary...

(b) Each health systems agency, State Agency, and Statewide Health Coordinating Council shall include in the procedures required by subsection (a) of this section at least the following:

* * * * *

(12) The following procedural requirements with respect to proceedings under a certificate of need program:

* * * * *

(E) Any person adversely affected by a final decision of a State Agency with respect to a certificate of need or an application for an exemption under section 300n-6(b) of this title and a health systems agency if the decision respecting the certificate of need is inconsistent with any recommendation made by the agency to the State Agency with respect to the certificate of need may, within a reasonable period of time after such decision is made (and any administrative review of it completed), obtain judicial review of it in appropriate State court. The decision of the State Agency shall be affirmed upon such judicial review unless it is found to be arbitrary or capricious or not made in compliance with applicable law.

(d) Section 197.335 of the Missouri Certificate of Need Law, Mo. Rev. Stat. §197.300, et seq. (1984 Cum Supp.), which provides as follows:

> Appeals, venue. — Within thirty days of the decision of the committee, the applicant or the health systems agency within whose area the new institutional health service is to be offered may file an appeal in accordance with the provisions of sections 161.252 to 161.342 and chapter 536, RSMo. provided, that venue of any appeal to the circuit court shall be in the county within which such health care service or facility is proposed to be developed.

STATEMENT OF THE CASE

With the exception stated below, Appellant's Statement of the Case adequately advises the Court of the parties and the proceedings had in this matter in the State Agencies and Courts below. Appellee shall not restate same but rather directs the Court's attention to Appellant St. Joseph's admission that it failed to raise the constitutional question presented to this Court until its Application for transfer presented to the Missouri Supreme Court. (Statement of Jurisdiction at 9-11).

Appellant did not previously raise this constitutional question in the Circuit Court or in the Missouri Court of Appeals, Eastern District. Its argument in those Courts was not that the Missouri CON Law as it related to judicial review conflicted with NHPRDA and was therefore invalid on the basis of the Supremacy Clause of the United States Constitution, but rather it argued the intent of the Missouri Legislature to afford Appellant the right of judicial review is evidenced by its alleged desire to adopt the guidelines set forth in NHPRDA. Appellant did not raise the issue in it's Motion for Rehearing filed in the Missouri Court of Appeals. (App. at A-1).

ARGUMENTS SUPPORTING APPELLEE'S MOTION TO DISMISS

I. This Court Should Not Accept Jurisdiction Over This Case As An Appeal Under 28 U.S.C. §1257(2) For The Reason That The Constitutionality Of A State Statute Was Not Drawn Into Question, Presented Or Decided In The Case By The Missouri Court Of Appeals.

Appellant has alleged that jurisdiction to review the decision of the Missouri Court of Appeals is conferred upon the Supreme Court by 28 U.S.C. §1257(2), which provides:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> > (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of its validity.

The federal question presented must be timely and properly raised and expressly decided. Supreme Court Rule 16(1)(b); *Live Oak Water User's Association v. Railroad Commissions,* 269 U.S. 354 (1926). When it has not been presented to and decided by the court whose decision is being appealed the United States Supreme Court should not take jurisdiction. *New York v. Kleinert,* 268 U.S. 646 (1925). Likewise, when the question is first presented by application for transfer to a higher state court, the Supreme Court should not take jurisdiction unless the question was thereupon considered and passed upon adversely by that state court. In the case at bar, the Missouri Supreme Court retransferred the case without decision. (Appellant's App. at A-47).

Appellant did not draw into question whether the Missouri CON Law was constitutional in either the Missouri Circuit

Court or Court of Appeals. (Appellant's Statement of Jurisdiction at 9-11). Further, it was not raised in Appellant's Motion for Rehearing or Transfer filed in the Missouri Court of Appeals (App. at A-1). In fact, the constitutionality of the Missouri CON Law was not drawn into question by Appellant until its application for transfer to the Missouri Supreme Court. (Appellant's App. at A-72). The question presented to the Circuit Court and the Court of Appeals was whether the Missouri legislature intended to afford Appellant the right of judicial review as evidenced by what Appellant alleged as its desire to adopt the guidelines set forth in NHPRDA.

Accordingly, the question not having been timely or properly presented to or decided by the state courts, jurisdiction is not conferred to this Court by section 1257(2) and the Court should not take jurisdiction over the matter.

II. Appellant's Appeal From The Decision Of The Missouri Court Of Appeals, Eastern District, Does Not Present A Substantial Federal Question Meriting Review By This Court.

Appellant states that the central question in this case is the obligation of states to follow the NHPRDA, but fails to properly address each provision of the act, the current regulations implementing it, and the cases construing it. On proper review it is apparent that Congress intended by the NHPRDA of 1974, as amended in 1979, to benefit consumers of health care services by reducing the costs of these services. Any benefit conferred upon existing health care providers was merely incidental, if not speculative. *Community Psychiatric Centers v. Grant,* 664 F.2d 1148 (9th Cir. 1981). In 1979 Congress enacted amendments to the act to improve competition as one manner employed to effect this result. *National Gerimedical Hospital v. Blue Cross,* 452 U.S. 378, 387 (1981). It is also apparent that many provisions of NHPRDA, including the provisions thereof concerning judicial review, are not self-executing and were not intended to extend rights to existing health care providers.

Appellant argues that NHPRDA mandates that each state health plan have certain specified procedural requirements regarding its certificate of need program. Relying upon 42 U.S.C. §300n-1(b)(12)(E), Appellant argues it has a right to seek judicial review of a decision of the state agency, that right being among those alleged requirements. Appellant fails, however, to consider the entire act and the judicial decisions construing it. In addition, the holdings of the cases it cites do not support its contention.

By case law it is well established that the federal act is not binding upon the states and does not determine state certificate of need issues. *See Greater St. Louis Health Systems Agency v. Teasdale,* 506 F.Supp. 23 (E.D., Mo. 1980); *North Carolina ex rel. Morrow v. Califano,* 445 F.Supp. 532 (E.D., N.C. 1977), *aff'd mem.,* 435 U.S. 1962 (1978); *Goodin v. State ex rel. Oklahoma Welfare Commission,* 436 F.Supp. 583 (W.D. Ok. 1977); and *East Tennessee Health Improvement Council, Inc. v. Tennessee Health Facilities Commission,* 626 S.W.2d 272 (Tenn. App. 1981). As these courts found, NHPRDA provides only a model, guidelines, with no direct bearing upon the terms of the state certificate of need laws. The NHPRDA is not self-executing. *East Tennessee Health Improvement Council, supra* at 276. Although failure to comply with its terms may result in the denial of federal funds for specific state programs, a state is nevertheless free to risk this financial loss by ignoring provisions of the federal act and its regulations if it chooses to do so.

Further, the act itself specifically provides that the state plan, and its certificate of need program, need only be satisfactory to the Secretary of the Department of Health and Human Services to receive approval and federal funding. 42 U.S.C. §300n-1(a) (1983); *Greater St. Louis Health Systems Agency, supra* at 28. Appellant has not disputed that Missouri's state health plan and present certificate of need law has been approved by the Secretary. As the Missouri Court of Appeals found in its decision in this case section 300n-1(a) expressly provides that pro-

cedural requirements that may otherwise be required in a state health plan or certificate of need program may be waived by the secretary. (Appellant's App. at A-44). Section 197.335 of the Missouri CON Law provides that *only* the applicant and the respective health systems agency have standing. By approving the Missouri certificate of need program the secretary implicitly waived any procedural requirement that may have required that existing health care providers be granted the right to seek judicial review.

Furthermore, as the Missouri Court of Appeals found, even assuming that the procedures and procedural requirements provided in section 300n-1(b) are mandatory, the particular procedural requirements must nevertheless be construed. Section 300n-1(b)(12)(E) provides as follows:

> Any person adversely affected by a final decision of a state agency with respect to a certificate of need...and a health systems agency...may with a reasonable period of time after such decision is made (and any administrative review of it completed), obtain judicial review of it in an appropriate state court. The decision of the state agency shall be affirmed upon such judicial review unless it is found to be arbitrary or capricious or not made in compliance with applicable law.

Although Congress provided the definitions for many terms used in this act, it did not define the terms "affected persons" or "persons adversely affected." *See* 42 U.S.C. §300n and 300n-1(b)(12(E).

Current regulations of the Department of Health and Human Services also do not define "affected persons." 42 C.F.R. §123.401 & .410(a)(14), as amended, *see* 50 Fed.Reg. 2008, 2009, 2013, and 2018 (1985) (effective February 15, 1985). Pursuant to amendments to the Public Health Service Act the Department of Health and Human Services amended its regulations with the "primary purpose...to reduce regulatory

burdens and to give states maximum flexability in operating their certificate of need programs." 50 Fed.Reg. 2008 (1985). The federal agency found that "*each state is the best judge of the needs and goals of its program and, therefore, should decide, to the maximum extent possible, how its certificate of need program should be administered.*" *Id.* (Emphasis added). Accordingly, it deleted all definitions of "affected persons" and "person adversely affected", concluding the definitions were not consistent with congressional intent and not required by statute. 50 Fed. Reg. 2008, 2009, 2013 and 2018 (1984). Thus, the principal basis upon which Appellant has previously argued that it had the right to seek judicial review has been eliminated by a regulatory agency carrying out the intent of Congress.

The decision of the Missouri Court of Appeals is consistent with prior decisions of courts deciding the right to "standing" based upon NHPRDA. In *Community Psychiatric Centers v. Grant,* 664 F.2d 1148, 1151 (9th Cir. 1981), the United States Court of Appeals decided that NHPRDA does not grant an existing health care operator an express or implied private right of action to prevent a hospital from offering new institutional health services. The Court found that "[c]ongress was not concerned with the harm that a competitor might suffer by the entry of a new provider into the market where there was no actual need for its services. Rather, Congress was concerned with the rising cost of hospital care and the trend toward the practice of supplying unnecessary service." *Id.* at 1151. The Act was intended to benefit consumers of hospital services and their insurers, and not existing health care facilities. *Id.* at 1152. *See also East Tennessee Health Improvement Council, Inc. v. Tennessee Health Facilities Commission,* 626 S.W.2d 272 (Tenn. App. 1981) (Health Systems Agency held not an "aggrieved person" and denied standing).

Appellant argues that the decision of the Missouri Court of Appeals "establishes a precedent of nationwide impact for the operation of the NHPRDA's certificate of need program and

will produce conflicting interpretations of the program." It suggests that the decision of the Missouri Court of Appeals may affect the decision regarding matters presently pending before *trial courts* in the State of Connecticut. As stated above, it is the intent of Congress and the Department of Health and Human Services that states be given maximum flexability in operating their certificate of need programs. Thus, Appellant's request that this Court afford standing rights to each and every current health care provider without regard to the standing rights of each respective state should be denied.

Appellant has also cited other state court cases holding health care providers have standing to seek judicial review of the decision of a state agency. Like the Missouri Court of Appeals, those courts determined the "standing" rights of the parties based upon state law, not NHPRDA. *See Sisters of Providence in Washington, Inc. v. Department of Social Services,* 648 P.2d 970 (Alaska 1982); *Memorial Hospital of Southern California v. State Planning Council,* 28 Cal. App. 3rd 167, 104 Cal. Rptr. 492 (1972); *Suburban Medical v. Olathe Community Hospital,* 597 P.2d 645 (Kan. 1979); *Twin Ports Convalescent, Inc. v. Minnesota State Board of Health,* 257 N.W.2d 343 (Minn. 1977); In Re Wilksboro, Ltd., 285 S.E.2d 626 (N.C. App. 1982); *Tulsa Area Hospital Council, Inc. v. Oral Roberts University,* 626 P.2d 316 (Ok. 1981) ("standing issue not examined).

Assuming the question of constitutionality was properly presented to the Court, the decison of the Missouri Court of Appeals in this case does not conflict with recent decisions of this Court regarding the Supremacy Clause of the United States Constitution. In *Michigan Canners and Freezers Association, Inc. v. Agricultural Marketing and Bargaining Board,* ____ U.S. ____, 104 S.Ct. 81 L.Ed.2d 399, 52 U.S.L.W. 4739 (1984), this Court held the Michigan statute was preempted by the Federal Agricultural Fair Practices Act since it authorized producers associations to engage in conduct which the federal act expressly prohibited. In *Lawrence County v. Lead-Deadwood*

School District No. 40-1, ____ U.S. ____, 105 S.Ct. 695, 703-704 (1985), this Court held that the South Dakota statute limiting the use by its political subdivision of payments received from the federal government pursuant to the payment in lieu of taxes act was preempted because Congress had directly provided in the act that the funds so paid could be used for "any" use.

The Missouri Certificate of Need Law is not so preempted. Congress enacted NHPRDA under its spending power. *Greater St. Louis Health Systems Agency, supra; Consumer Psychiatric Centers, supra.* It is not self-executing and the Secretary is given the discretion to waive procedural requirements to allow states maximum flexibility in operating their certificate of need programs. *Id.*

CONCLUSION

Appellant failed to timely raise a constitutional argument, its petition for appeal of the decision of the Missouri Court of Appeals, Eastern District fails to present a substantial federal question and the Missouri decision is not in conflict with other decisions construing the National Health Planning and Resources Development Act. Accordingly, this Court should dismiss Appellant's appeal.

Respectfully submitted,

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APPENDIX

IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT

No. 47685

St. Joseph Hill Infirmary, Inc.,
Plaintiff-Respondent,

v.

Rabbi Herbert J. Mandl, et al.,
as members of the Missouri
Health Facilities Review
Committee,
Non-appealing Defendant,

and

Pacific Care Center, Inc.,
Defendant-Appellant.

MOTION OF ST. JOSEPH HILL INFIRMARY, INC. FOR REHEARING, OR IN THE ALTERNATIVE, FOR TRANSFER TO THE SUPREME COURT AND INCORPORATED SUGGESTIONS IN SUPPORT

Now comes Plaintiff-Respondent St. Joseph Hill Infirmary, Inc. ("St. Joseph"), and hereby moves this Honorable Court, pursuant to Rules 84.17 and 83.02, for Rehearing or, alternatively, for Transfer. In support of its Motion, St. Joseph respectfully states as follows:

1. On May 22, 1984, the panel issued its Opinion holding that St. Joseph's interest was insufficient to confer standing, under Missouri Constitution Article V, Section 18, to seek judicial review of a Missouri Health Facilities Review Committee ("Committee") decision granting Pacific Care Center, Inc. ("Pacific Care"), a competitor of St. Joseph, a certificate of need ("CON") to build a nursing home. In so ruling, the panel placed heavy reliance on its belief in the existence of Health Systems Agencies ("HSAs") to appeal from Committee deci-

sions in order to protect the public interest in lower health care costs.

This confidence in the role of HSAs in the appellate process was expressed at least three times in this initial opinion. First, in rejecting St. Joseph's argument that denial of competitor standing in CON cases foreclosed judicial review, the panel states that: "The statutory framework of the CON Statute provides for an appeal by the applicant, which has a private interest, *or by the area HSA which exists to protect the public interest.*" (Slip Op. at 4.) Again, in a later discussion of the reasons why the panel maintained that the legislature intended to deny competitor challenges to CONs, the Opinion recites: "only if the action of the Committee is such as to trigger *the appellate opposition of the HSA, representing the public interest* is determination of necessity to be delayed for an appellate review." (Slip Op. at 8.) Finally, in an analysis of the standing issue in the context of the banking cases, an examination mandated "because of parallels to the statutes now before us" (Slip Op. at 5), the panel rejected St. Joseph's view of those cases because: "There is also a difference in the availability of an agency to represent the public interest, particularly *in view of the existence of HSA's* whose function is exactly that." (Slip Op. at 9).

However, *HSAs no longer exist in Missouri and have not existed for three years.*[1] Accordingly, the panel's analysis of the

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[1] The termination of HSAs was described at oral argument. Counsel listened to the Court's tape of the oral argument wherein counsel for St. Joseph stated: "Well, as was pointed out in the Amicus Brief of Platte County Medical Center, Health Systems Agencies don't exist any more in the State of Missouri. They were banned by executive order of Governor Bond in 1980." That point was undisputed by Pacific Care and accordingly, this Court should take judicial notice of that fact. See *Flight Engineers' Internat'l Ass'n v. Trans World Airlines,* 305 F.2d 675, 679 n. 6 (8th Cir. 1962). Further, copies of Governor Bond's Executive Order, and the Secretary of Health and Human Servcies' response, are attached to this Motin. As these orders are public records of official acts this Court may take judicial notice of the attached. See, *Kansas City v. City of Raytown,* 421 S.W.2d 504, 513 (Mo. 1967) (En Banc).

legislative history, its examination of the concededly relevant precedent, and, indeed, its assessment of the impact of its ruling on the "public interest" is fundamentally flawed because it depends on the assumed existence of an agency that was terminated three years ago by the Governor.

Thus, contrary to the misplaced belief expressed by the panel, no one exists to seek judicial review of Committee decisions to approve new health facilities. Stated otherwise, this panel's Opinion forecloses review in any case where the applicant is successful before the Committee. Surely neither the Committee, which issued the approval here, nor Pacific Care, which obtained approval here, will appeal a favorable ruling. In the absence of the HSAs, the only person who is aggrieved by the decision, to an extent sufficient to challenge the Committee's action, is a competitor, such as St. Joseph.

The mistaken reliance on HSAs to vindicate the public interest demonstrates the vital importance in recognizing standing rights in competitors to challenge CON decisions. In the absence of those standing rights an agency decision, such as the one at issue here, is left totally insulated from any judicial scrutiny even though the undisturbed findings of the circuit court below were that: (1) Pacific Care's proposed facility and St. Joseph's facilities would compete for the same patients (L.F. at 24); (2) The State Health Planning and Development Agency, the investigative arm of the Committee, found the proposed facility to be unnecessary and potentially harmful to other providers, including St. Joseph (L.F. at 26); and (3) the Committee's decision contained no findings of fact and conclusion of law and was thus contrary to its own rules (L.F. at 41-44). Consequently this matter should be reheard, or transferred, by this Court because of the material mistake of fact as to the existence of HSAs.

2. This Court should grant rehearing, or transfer, because the panel's opinion is directly contrary to established precedent in

both the Western District and this District. In rejecting the theory that a bank's competitive interest, like that of an institutional health care provider, is sufficient to confer standing under the Missouri Constitution Article V, Section 18, the panel's opinion is in conflict, and contrary to, the following decisions:

(A) *Bank of Belton v. State Banking Board,* 554 S.W.2d 451 (Mo.App. 1977)(W.Dist.). The Court in *Bank of Belton* held that, under a system of regulated competition, the Missouri Constitution accords competitor standing:

> There can be little question that a bank is aggrieved by a decision to allow a competitor facility within the same trade area . . . . The economic interest Belton Bank seeks to protect against the administrative order which allows UMB a facility in competition falls within the zone of interests protected by Article 5, §22 [now §18] of the Missouri Constitution as defined in §536.100. (554. S.W.2d at 453.)

The panel expressly rejected that holding of the Western District. (Slip Op. at 7-8.); and

(B) *Bank of Crestwood v. State Banking Board,* 554 S.W.2d 519 (Mo.App. 1977)(E.Dist. per Weier, J. with Kelly, J. and Gunn, J. concurring). In *Bank of Crestwood,* this District held that a competitor bank had standing to challenge an administrative decision to certify a competing bank facility. The decision in *Bank of Crestwood* was handed down four weeks after *Bank of Belton* was decided. The Eastern District panel expressly followed the holding in *Bank of Belton* because the Western District opinion "is well reasoned, based on sound principles and precedent, and rules this appeal." (554 S.W.2d at 522). The panel's rejection of *Bank of Belton* is directly contrary to the decision of another panel of this District; and

(C) *Farmer's Bank of Antonia v. Kostman,* 577 S.W.2d 915 (Mo.App. 1979). In *Farmer's Bank* the Court found com-

petitive interests sufficient to confer standing on one bank to challenge the Director of Finance's decision, pursuant to Mo.Rev.Stat. §362.108 (1978), to allow another bank to establish a branch. Importantly, however, the legislative provision at issue in *Farmer's Bank* did not allow competitor banks to intervene in the Director of Finance's decision to allow branching under Section 362.108, nor was there any provision for judicial review of a decision under Section 362.108 even though other administrative decisions pertaining to bank branching were made expressly subject to review. Nevertheless, the Court in *Farmer's Bank* held that a competitor bank's economic interests gave rise to standing rights under Article V, Section 18 of Missouri's Constitution. The omission of the statutory provisions for intervention are significant under the panel's opinion because the statutory right to intervene is perceived by the panel to be the fact distinguishing standing rights under the banking laws and the CON Law. Yet *Farmer's Bank* recognizes constitutional standing rights in the face of a statutory provision containing no intervention or appeal rights for competitors. The panel's opinion is, therefore, directly contrary to the holding in *Farmer's Bank;*

* * * *

This cause should be reheard, or transferred, because the panel's opinion is contrary to the decisions of both the Eastern and Western District Courts of Appeal.

3. This Court should grant rehearing, or transfer, because the panel's Opinion is in conflict with the decision in *Farmer's Bank of Antonia v. Kostman,* 577 S.W.2d 915, 921 (Mo.App. 1977), in still another crucial respect. The panel recognized that the purpose of the CON Law is to restrict competition. Then the panel concluded that such a purpose failed to give competitors an interest sufficient to create "private rights," because:

> "[t]he purpose of restricting competition through licensing is to benefit the public generally, not to protect the rights

> or interests of the regulated companies. As such, competitors may be the beneficiaries of the licensing procedures but those procedures do not directly affect their 'private rights'." (Slip Op. at 7.)

That holding is directly contrary to *Farmer's Bank of Antonia v. Kostman,* 577 S.W.2d 915, 921 (Mo.App. 1977), where the Court held that although the banking laws restricted competition to protect the public interest, that statutory policy also gave rise to private rights in existing competitor banks to resist competition. Thus the panel stated that:

> As a prelude, we iterate that the *law accords status to a competitor bank for judicial review* of an administrative grant of charter or facility to another bank within the trade area, not to protect monopoly, but *to keep the system of banks within an equipoise of competition and regulation and so secure the public against the economic havoc of bank failure.* (577 S.W.2d at 921, emphasis added.)

The panel's opinion fails to mention or discuss this conflict with the decision in *Farmer's Bank,* and accordingly this cause should be reheard, or transferred, to resolve this conflict.

4. The Court should grant rehearing, or transfer, because the panel's decision is predicated upon an erroneous reading of *State ex rel Donnelly v. Rouveyrol,* 285 S.W.2d 669 (Mo. Banc 1956). The panel read *Donnelly* as holding that competitor banks lacked standing to challenge decisions granting new bank incorporations in the absence of a statutory right to seek such review. (Slip Op. at 5.) *The Court in Donnelly never considered the status of a competitor.* The Court only held that a person denominated only as a "protestant" lacks standing. Thus, as the *Donnelly* Court plainly stated:

> This application . . . recites "Comes also University Bank, the Protestant herein, a corporation interested in the order of Board of Appeals." It does not appear that the courts

> of Missouri have had occasion to judicially define the term "Protestant" as used herein; however, in Webster's New International Dictionary, 2nd Ed., this definition appears: "3. One who makes or enters a protest; as the *protestants* against proposed legislation." This definition is consistent with the capacity in which the University Bank appeared before the board of bank appeals. (285 S.W.2d at 676).

Hence, the panel's reading of *Donnelly* is incorrect for it equates "protestant" in the context of a banking case with "competitor" in the context of this case. The *Donnelly* opinion never even mentions, much less analyzes, competitive interests. Consequently *Donnelly* failed to address the proposition for which it is cited by the panel.

5. This Court should grant rehearing, or transfer, because the panel's opinion is contrary to the decision in *City of Eureka v. Litz,* 658 S.W.2d 519 (Mo.App. 1983). The panel held that because the system of regulated competition under the CON Law is for the benefit of the public at large, competitors are accorded no private rights. (Slip. Op. at 7.) In so holding the panel assumes that the presence of an overriding public interest automatically precludes private rights.

However, all legislative and administrative action must, ultimately, be for the public good. See, *Day-Brite Lighting v. Missouri,* 342 U.S. 421, 423-25 (1952). With the Missouri Constitution's prohibition of special legislation, administrative action taken pursuant to statutes that regulate competition can only be sustainable if taken to promote the public interest as opposed to a private interest. See, *Annbar Associates v. West Side Redevelopment Corp.,* 397 S.W.2d 635, 646-47 (Mo. 1965) (En Banc). Notwithstanding the overriding public purpose to all regulatory schemes the panel recognized that "a competitor may achieve the status of an 'aggrieved person' based on the legislative policy of the particular statute establishing the administrative review." (Slip Op. at 5 citing *City of Eureka v.*

Litz, 658 S.W.2d 519 (Mo.App. 1983). Yet under the panel's reasoning it is impossible for that to occur because every statutory scheme must be created to serve some public interests. Thus no private rights can ever exist under the panel's formulation of the standing inquiry. Moreover standing to vindicate and promote a public purpose has been specifically recognized in taxpayer suits—an impossible result under the panel's view that the public purpose precludes private rights. See, *Missourians for Separation of Church and State v. Robertson,* 592 S.W.2d 825, 837-39 (Mo.App. 1979). Hence this matter should be reheard, or transferred, because of the general importance of this proposition and its conflict with the *City of Eureka* decision.

6. The panel's decision conflicts with the established rule in Missouri that the existence of standing rights under the Missouri Constitution is a judicial inquiry. The panel examined St. Joseph's interest to challenge the Committee's decision as whether the legislature intended competitors to have appeal rights. Thus, the panel explained that "[w]hether the system of regulation is best served by allowing competitors to participate in the administrative procedure is a legislative determination." (Memo. Op. at 8.) This statement is directly contrary to the holdings of *City of Eureka v. Litz,* 658 S.W.2d 519 (Mo.App. 1983); *State ex rel Schnieder v. Stewart,* 575 S.W.2d 904 (Mo.App. 1977), which state that whether a party is entitled to standing is a judicial question independent of the legislature's intention to give or deny appeal rights. Rehearing or transfer should be granted to resolve this conflict.

7. The panel erroneously relied on the legislative history of the Missouri CON Law and the National Health Planning and Resource Development Act, 42 U.S.C. §300, *et seq.* to decide the standing rights of St. Joseph. Assuming, *arguendo,* that the legislative history is relevant, the panel was wrong, or ignored, three key aspects to the relevant legislative histories and should rehear, or transfer, this cause to correct these errors of material fact and law:

(A) The panel heavily relies on changes to the original Missouri CON Law to conclude "affected persons", including competitors, lacked standing. Yet the panel ignores that the changes related to different appeal forums and not to the right to appeal. The original H.B. 222 provided in Section 9.1 that the applicant and HSA could appeal to the *Adminsitrative Hearing Commission.* There was no provision relating to the persons entitled to seek judicial review in circuit court. Such an omission is understandable because the decided Missouri case law was that the right to seek judicial review was secured by the Missouri Administrative Procedure and Review Act, Mo.Rev.Stat. §536, *et seq.,* in the absence of an inconsistent remedy provided specifically by the legislature. See *State ex rel Schnieder v. Stewart,* 575 S.W.2d 904 (Mo.App. 1977). Then in H.B. 222, as perfected, the Administrative Hearing Commission appeal right was deleted in favor of a general appeal to circuit court for all persons. As passed, however, the legislation reinstated the Administrative Hearing Commission appeal in lieu of direct appeal to circuit court. Again, though, the statute was silent as to the parties entitled to seek judicial review as opposed to further administrative review. Thus, in reality, the only thing that changed was the existence or non-existence of an administrative appeal as opposed to who had the right to seek judicial review. At best the legislative history is ambiguous as to standing rights for judicial review.

(B) The panel also ignored that the Missouri legislature amended the CON Law after standing rights under the law had been recognized for competitors. On May 20, 1983, the Circuit Court for St. Louis County held that competitors had standing under the Missouri CON Law to challenge a Committee decision to allow a new facility or service. See, *The Washington University v. Missouri Health Facilities Review Committee,* Findings of Fact, Conclusions of Law and Judgment (No. 481596, May 20, 1983). (A copy of the decision is found in St. Joseph's Appendix to its Brief.) Following that decision the legislature passed, and the Governor signed into law on July 1, 1983,

amendments to the Missouri CON Law. No alteration of the law was made to change the result in *The Washington University* case. The established law of this state is that the legislature is presumed to know judicial constructions of its acts. See, *State ex rel Danforth v. Milan C-11 School District,* 446 S.W.2d 768 (Mo. 1969). Moreover the legislature's failure to amend the law to change the result of a judicial construction gives rise to a presumption that the legislature agreed with and intended the result. See, *Phillips Pipeline Co. v. Brandstetter,* 263 S.W.2d 880, 885 (Mo.App. 1954). Thus, the legislature's 1983 amendments to the Missouri CON Law show an intent to grant competitors standing by leaving unaffected the *The Washington University* decision; and

(C) The panel ignored the federal legislative model because the statute nowhere defined "aggrieved persons entitled to seek review" as including competitors. (Slip Op. at 9.) Yet quite to the contrary, the legislative history of the federal act was explicit that "aggrieved persons" were to include competitors:

> The committee intends that the term "any person adversely affected by a final decision of the State Agency" will include . . . any provider in the health service area affected by an agency action . . . ." S.Rep. 96-96 at 72, reprinted in 1979 *U.S. Code Cong. and Admin. News* 1377.

The legislative history of the federal statutory model is deemed to be part of the relevant legislative history for Missouri's CON Law. See, *State v. Mitchell,* 563 S.W.2d 18, 24 (Mo. 1978).

Hence, when properly viewed the legislative history establishes that the federal law, which Missouri's CON law is patterned after, requires persons like St. Joseph to have standing, that the Missouri legislature amended the CON law, after it had been judicially construed to grant standing rights, and made no changes in the appeal provisions of the law, and the initial intent of the legislature with respect to appeal rights is, at best, ambiguous.

WHEREFORE, for all of the above reasons, Plaintiff-Respondent St. Joseph Hill infirmary, Inc. respectfully requests that this Honorable Court grant this Motion for Rehearing or, alternatively, Transfer this cause to the Supreme Court.

Dated: June 6, 1984 Respectfully submitted,

/s/ David M. Harris
J. Roger Edgar
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